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No. 97-95

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,
Petitioners,
v.
BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITION

DAVID E. FELLER *
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720-7200
(510) 642-0629

GEORGE NICOLAU
Immediate Past President
125 East 10th Street
New York, NY 10003-7504
Attorneys for the National Academy of Arbitrators

*Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Academy of Arbitrators respectfully moves for leave to file the attached *amicus curiae* brief in support of petition for certiorari herein. Counsel for petitioner has given its consent that such a brief be filed. Counsel for respondent has refused, even suggesting that the filing of such a brief would compromise the neutrality of Academy members. The letters granting and denying consent have been lodged with the clerk.

The National Academy, founded in 1947, is a professional organization of neutrals. Candidates for membership must be elected by a two-thirds vote of the members at its annual meetings after careful consideration of their qualifications by its membership committee. To be considered for membership an arbitrator must demonstrate acceptability by management and labor through substantial and current experience as impartial arbitrator of labor-management disputes (at a bare minimum 50 cases within 5 years with a variety of parties) or, as an exception, have obtained general recognition through scholarly publication or other activities as an impartial authority in labor-management relationships. Members are prohibited from serving as advocates for either labor or management. Currently the Academy has 651 American and Canadian members.

The Academy's principal purposes, set out in its constitution are "to establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management and employment disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . .; to promote the study and understanding of the arbitration of labor-management and employment disputes." Its function was best described by its president in 1983:

> "The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism, a keen and controlling sense of social responsibility—a sense of responsibility for advancing socially desirable goals lying outside and beyond one's personal or group interests—has motivated this Academy and

its dedicated and committed leadership throughout its history.[1]

The Academy is the co-author and principal enforcer of an ethical code, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, that has been adopted by the American Arbitration Association and the Federal Mediation and Conciliation Service. The proceedings of the annual meeting of the Academy are published by the Bureau of National Affairs and constitute the most authoritative collection in existence of materials on the arbitration process.

The Academy does not ordinarily participate in litigation. It has filed *amicus curiae* briefs in only two cases, both in this Court: *A.T. & T. Technologies* v. *Communications Workers,* 475 U.S. 643 (1986) and *United Paper Workers* v. *Misco,* 484 U.S. 29 (1989). In both cases the brief was filed, with the consent of the parties, because the Academy believed that if the law is to be involved in the arbitration process, as Congress in effect mandated by enacting Section 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. § 185), that involvement should serve to effectuate the purposes for which unions and employers have established that process. This Court's prior decisions with respect to arbitration had served those purposes well but the decisions below in those two cases had the potential for disturbing the regime established by the parties and supported by the prior decisions of this Court.

In *A.T. & T. Technologies* the error of the court below was vesting in the arbitrator rather than a court the right to determine arbitrability of a grievance. In *Misco,* to the contrary, the error was in setting aside an arbitrator's award on the merits. This case is like *Misco*: The Court

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[1] Abernethy, *The Presidential Address,* in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 13.

of Appeals set aside an arbitrator's award on grounds plainly contrary to the principles first announced by this Court in *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). But the importance of this case is not that the court below erred, even if egregiously. The importance of the case, and the reason for this motion, is that this case is but the latest in a series in which the law established by this Court with respect to the review of arbitrators decisions, while duly acknowledged, has in effect been undermined and, in reality, disregarded by the importation of a new doctrine: that it is beyond the arbitrator's authorship to issue an award contrary to what the reviewing court believes the language of the collective bargaining agreement means.

That doctrine was explicitly described by the Court of Appeals for the Fifth Circuit in an earlier decision as "the rule in this circuit and the emerging trend among other courts of appeal." [2] That rule amounts to a standing invitation to both employers and unions to seek judicial review of arbitration decisions with which they disagree. And it has led, as we will demonstrate in the accompanying brief, to a rapidly increasing proportion of decisions in which such review is sought.

Such a trend is not only contrary to the decisions of this Court. It is a pernicious undermining of the system of industrial jurisprudence that has served the nation well in reducing industrial strife. We recognize that this Court is not a court of errors and appeals and does not normally accept cases simply because they are wrongly decided. But when a case such as this one is a symptom of an underlying disease which, if not attended to, will sap the vitality of a sound system of industrial relations it is appropriate that an organization dedicated to the preservation of that system be given an opportunity to express its views in support of review.

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[2] *Delta Queen Steamboat Co. v. District 2, MEBA*, 889 F.2d 599, 604 (5th Cir. 1989) *rehg en banc. denied*, 897 F.2d 746 (1990) *cert. denied*, 498 U.S. 853 (1990).

For these reasons, the National Academy of Arbitrators respectfully requests leave to file the accompanying brief *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

DAVID E. FELLER *
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720-7200
(510) 642-0629

GEORGE NICOLAU
Immediate Past President
125 East 10th Street
New York, NY 10003-7504
Attorneys for the National Academy of Arbitrators

*Counsel of Record

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITION

INTEREST AND CONCERN OF THE *AMICUS*

The interest and concern of the National Academy of Arbitrators is set out in full in the motion for leave to file to which this brief is appended and will not be repeated here.[1]

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[1] Rule 37.6 statement: Counsel of record is the author of this brief, as well as the accompanying motion for leave to file it. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The decision below is not only contrary to the decisions of this Court, it is the latest of a series of decisions by the Fifth and other circuits adopting a "plain meaning" rule: Arbitration decisions will be set aside if they construe a collective bargaining agreement in a way that contradicts what the court believes is the plain meaning of the agreement. This rule has led to an increasing resort to the courts by both employers and unions that undermines the federal labor policy. Certiorari should be granted to make it clear that the "plain meaning rule" is contrary to this Courts' decisions and that the same standard for revocation of an award applies both to commercial arbitration under the Federal Arbitration Act and labor arbitration under Section 301 of the Labor Management Relations Act.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY TO CORRECT THE "PLAIN MEANING" RULE FOLLOWED BY THE FIFTH AND SOME OTHER CIRCUITS.

As the petition for certiorari and the dissent in the court below demonstrate, the decision sought to be reviewed is plainly contrary to this Court's decisions in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and *International Paperworkers Union v. Misco Inc.*, 484 U.S. 29 (1989). The arbitrator and the district court both concluded that it was "unreasonable" to read the contract provision listing "immoral conduct" as a ground for immediate discharge as covering the grievant's conduct. The court of appeal rejected the award because it simply read the provision differently.

The decision is not an isolated aberration. To the contrary, it is just one of a series of cases in which the Fifth Circuit and some other circuits have adopted a mistaken doctrine that this Court should review and reject. In this case the court explicitly said that it acted in

reliance on the rule announced by it in *Delta Queen Steamboat Co. v. District 2, MEBA*, 889 F.2d 599, 604 (5th Cir. 1989): ". . . the rule in this circuit and the emerging trend among other courts of appeals is that arbitral action contrary to express contractual provisions will not be respected." That rule has been consistently applied by the Fifth Circuit. See *Houston Lighting and Power Co. v. International Brotherhood of Electrical Workers*, 71 F.3d 179, 184 (5th Cir. 1995) where the court said: "If the language of the agreement is clear and unequivocal, an arbitrator is not free to change its meaning."

The Fifth Circuit is unfortunately accurate in saying that the rule it announced in *Delta Queen* and applied in this case was an "emerging trend" in other courts of appeal. And because it is accurate we believe it necessary for this Court to intervene by granting review.

The accuracy of the court's statement as to "the emerging trend" is shown by the following quotation from the decision of the Court of Appeals for the Seventh Circuit in *Polk Brothers, Inc. v. Chicago Truck Drivers*, 973 F.2d 593, 599 (7th Cir. 1992):

> "Our holding is consistent with the decisions of several other circuits, which have struck down arbitrator's decisions which were contrary to contractual provisions. See *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940, 945-46 (1st Cir. 1988); *Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990); *Delta Queen Steamboat Co. v. District 2, Marine Engineers Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990) ("We agree with the company that the rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected."); *International Brotherhood of Electrical*

Workers, Local 429 v. Toshiba America, Inc., 879 F.2d 208, 210-11 (6th Cir. 1989); *Bruno's Inc. v. United Food and Commercial Workers Int'l Union, Local 1657*, 858 F.2d 1529, 1531 (11th Cir. 1988)."

As a decision of the First Circuit put it: "if the language of an agreement is clear and unequivocal, an arbitrator cannot give it a meaning other than that expressed by the agreement." *Georgia-Pacific Corp. v. Local 27 United Paperworkers International Union*, 864 F.2d 940, 944 (1st Cir. 1988). Or, as expressed by the Sixth Circuit: "an award fails to derive its essence from the collective bargaining agreement when it conflicts with the express terms of the agreement." *Ficks Reed Co. v. Local 112*, 965 F.2d 123, 125 (6th Cir. 1992).

As the respondent will undoubtedly argue, the Court did say in *Misco*, at 38, that "the arbitrator may not ignore the plain language of the contract." But there is an enormous difference between ignoring the plain language of the agreement and, on the other hand, paying attention to it and construing it in a way that differs from what a court believes that plain language means.

The rule announced by the Fifth Circuit and followed, sometimes erratically, by some other courts of appeal has been applied most often in discharge cases. They exhibit a common pattern. It has long been part of "the common law of the shop" that the degree of penalty that will be sustained by an arbitrator is in keeping with the seriousness of the offense. In cases of extremely serious offenses, arbitrators will sustain discharges where there was no prior warning and no opportunity for the employee to correct his conduct. In less serious cases, arbitrators generally insist upon progressive discipline and reduce the penalty of discharge to a suspension.[2] Recognizing this principle, many collective bargaining agreements spell out, either in the agreement itself or in the rules properly

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[2] Elkouri & Elkouri, *How Arbitration Works* (5th ed., 1997) 916.

issued under it, which offenses are serious enough to justify immediate discharge and which offenses require prior warning or other progressive discipline. Many such agreements, including the agreement in this case, also retain the provision requiring "just cause" for discipline. This creates an interpretive problem: do the parties intend that the categorization of offenses, distinguishing between those for which immediate discharge may be appropriate and those for which progressive discipline is required, eliminates the simultaneous requirement that the discipline imposed be only for "just cause"? In addressing this question arbitrators often conclude that the listing of offenses does not eliminate the requirement of just cause and that if there are mitigating factors or a failure of due process, or if the rule in question is discriminatorily applied, a discharge will be set aside as not for just cause even though it falls within the category of offenses for which prior warning and progressive discipline is not required. As the petition for certiorari demonstrates, the courts of appeal are divided on the question of whether in such instances the arbitrator has departed from the "plain meaning" of the collective bargaining agreement.[3]

In this case neither the arbitrator nor the district court found it necessary to reach the question of whether the listing of "immoral conduct" as an offense justifying dis-

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[3] Compare *S.D. Warren Co. v. Paperworkers Local 1069*, 846 F.2d 827 (1st Cir. 1988) and *Brunos, Inc. v. United Food & Commercial Workers*, 858 F.2d 1529 (11th Cir. 1988) *cert. denied* 488 U.S. 992 (1988) with *Midwest Coca-Cola Bottling Co. v. Allied Sales Division*, 89 F.3d 514 (8th Cir. 1996) and *Arco-Polymers, Inc. v. OCAW, Local 8-74*, 671 F.2d 752 (3d Cir. 1982) *cert. denied* 459 U.S. 828 (1982). For a recent decision reviewing the difference see *Mitchell Plastics, Inc. v. Plastic Workers*, 155 L.R.R.M. (BNA) 2496 (W.D. Pa. 1996).

To avoid this problem some agreements, *but not the agreement in this case*, specify that for some offenses, typically, violation of the no strike clause, the arbitrator shall have no authority to modify the discipline imposed.

charge without prior warning overrode the requirement that there be just cause. Both agreed that it was unreasonable to equate the grievant's little lie with the listed offense of "immoral conduct". But when the Fifth Circuit ordered that her discharge be "reinstated" it effectively, if silently, concluded also that the "plain meaning" of the agreement eliminated the requirement for just cause, a result flatly in conflict with cases in other circuits, most recently the Eighth Circuit in *Local 238, International Brotherhood of Teamsters v. Cargill, Inc.*, 66 F.3d 988 (1955) and the Second Circuit in *First National Supermarkets v. Retail, Wholesale and Chain Store Food Employees Union Local 338*, 155 L.R.R.M. (BNA) 2543 (June 10, 1997).

The "plain meaning" rule has not been limited to discharge cases. An exemplar is the *Polk Brothers* case, *supra*. In that case case an arbitrator found that the employer had violated the contract by contracting out some work and ordered reinstatement with back pay of the employees displaced by the contracting out. The employer did not contest the finding that it had violated the contract, nor the award of back pay up to the date of the contract's termination. It argued, however, that the arbitrator had no authority to award reinstatement and back pay for any period past the contract's termination date. The court sustained this contention, relying on the "plain meaning" rule. The agreement provided that the arbitrator had "no power to add to, subtract from, modify or amend any provision of this agreement", a standard, boilerplate provision stating a principle applicable to all grievance arbitration whether or not spelled out. By providing a remedy subsequent to the termination of the agreement, the court said, the arbitrator contradicted the plain meaning of that provision, a result exactly contrary to the conclusion of this Court in precisely the same situation in *Steelworkers v. Enterprise Wheel & Car, Corp.*, 363 U.S. 593 (1960).

II. THE COURT SHOULD GRANT CERTIORARI TO HARMONIZE THE REVIEW STANDARDS FOR LABOR AND COMMERCIAL ARBITRATION.

Labor arbitration is governed by Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Until 1960 what this Court has since characterized as "the outmoded presumption of disfavoring arbitration procedings" [4] was applied to attempts to enforce arbitration provisions in collective bargaining agreements. The judicial attitude was best expressed in New York in the *Cutler-Hammer* case: [5] "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." The attitude in the federal courts was the same. Agreements to arbitrate would not be enforced unless the party seeking arbitration could "produce evidence which tends to establish his claim" before a court would compel it. *Engineers Ass'n v. Sperry Gyroscope Co.*, 251 F.2d 133, 137 (2nd Cir. 1957) *cert. denied*, 356 U.S. 932 (1958).

This Court in 1960, in what has been called the Steelworkers trilogy, relied on the federal labor law policy expressed in Section 203(d) of the Labor Management Relations Act, 1947, 29 U.S.C. § 173(d) to elevate labor arbitration's status. It said that "the run of arbitration cases illustrated by *Wilko v. Swan*" was irrelevant. "Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here." *Steelworkers v.*

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[4] *Rodriguez de Quijas v. Shearson/American Express Co.*, 490 U.S. 477, 481 (1989).

[5] *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 67 N.Y.S. 2d 317, 318 (N.Y. App. Div. 1947) *aff'd* 297 N.Y. 519 (1947).

Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). Accordingly, "an order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage." *Id.* at 583-584. The *Cutler-Hammer* doctrine was explicitly overruled in *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

Since then the hostility of the courts, and particularly this Court, to commercial arbitration has been completely reversed. The presumption of arbitrability, first stated in labor cases, has now been applied under the Federal Arbitration Act, 9 U.S.C. §§ 1-16. *Moses H. Cone Memorial Hosp. Mercury Construction Corp.*, 460 U.S. 1 (1983). The courts, including this Court, have begun to cite labor arbitration cases indistinguishably from commercial arbitration cases in determining whether arbitration should be ordered.[6]

When review of an arbitration award is sought, however, the emergence of the "plain meaning" rule now inverts this convergence of the standards applicable to labor and commercial arbitration. At common law an arbitration award was not reviewable for error of fact or law. *Burchell v. Marsh*, 58 U.S. (17 HO.) 344 (1855). This rule was embodied in the Federal Arbitration Act. Section 10 of that Act limits the ground upon which an arbitrator's award may be set aside. Although some courts have expanded upon those grounds, relying upon a dictum of this court in *Wilko v. Swan* that an arbitrator's award could be set aside for "manifest disregard" of the law,[7] the plain meaning rule has not been adopted. The courts of appeal have almost uniformly declared that in order

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[6] See, e.g., *First Options of Chicago, Inc. v. Kaplan and M K Investments*, 115 S.Ct. 1920, at 1923-1925 (1995).

[7] *Wilko v. Swan*, 346 U.S. 427, 436 (1953), cited in *First Options of Chicago, supra* n.5 at 1923.

to show manifest disregard of the law it must be shown that the arbitrator both knew the law and consciously determined not to follow it.[8] That the arbitrator misread the plain meaning of the contract being applied is not sufficient to overturn an award under the FAA.[9]

This Court invoked labor policy to reach the same result under Section 301 in the third case of the Steelworkers trilogy, *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). But now what has been aptly called the inverse *Cutler-Hammer* doctrine[10] has been applied by the courts that follow the "plain meaning" rule.

The two different standards for review of arbitration decisions[11] have been described by the First Circuit in *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990):

> ". . . the determinant of this array of alternatively awarded formulations consists of two classes of cases

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[8] *Siegel v. Titan Ind. Corp.*, 779 F.2d 891, 892-893 (2d Cir. 1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-934 (2d Cir. 1986).

[9] *I/S Stavborg v. National Metal Converters*, 500 F.2d 424 (2d Cir. 1974); *National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 142 (7th Cir. 1977).

[10] S. Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, Proc. of the 40th Annual Mtg. of the Nat'l Acad. of Arbitrators 25, 32 (1988).

[11] As the leading treatise on FAA arbitration puts it: ". . . a number of considerations pertinent to vacation in collective bargaining arbitraiton are not pertinent to FAA arbitration. These include different rules respecting the public policy defense, a greater inclination of some courts treating collective bargaining awards to find a 'failure to draw its essence from the contract' or that an award is against the plain meaning of the collective bargaining agreement." 4 MacNeil, Speidel and Stipanowich, *Federal Arbitration Law* (1995) § 40.5.1.3. See also *id.* at §§ 40.5.2.6. and 40.6.1, where the authors say that the two standards from LMRA cases: "contrary to the plain language of the agreement "and failure to draw its essence from the contract" are inapplicable to FAA arbitration. -

> where an arbitral award is subject to review. One category, usually involving labor arbitration, is where an award is contrary to the plain language of the collective bargaining agreement [citing labor arbitration cases] . . . . The second category embraces instances where it is clear from the record that the arbitrator recognized the applicable law—and then ignored it [citing commercial arbitration cases]."

The courts that do not subscribe to the "plain meaning" rule reject the notion that there are two categories. As Judge Posner put it for the Seventh Circuit:

> ". . . the question for decision by a federal court asked to set aside an arbitration award—*whether the award is made under the Railway Labor Act, the Taft-Hartley Act, or the United States Arbitration Act*—is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract." *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987) (emphasis added).

Labor arbitration *is* different from most commercial arbitration. Most commercial arbitration simply decides who owes, or does not owe, how much to whom. Labor arbitration does more. Labor arbitration awards are part of an ongoing and continuing relationship and are an essential part of a system of industrial self-government. As this court has said "it is through these [grievance and arbitration] processes that the supplementary rules of the plant are established." [12] They not only resolve the particular case but also serve as a guide to the parties in their continuing relationship. They are final for the purposes of disposing of a particular grievance. They are also final for determining what the rule under the collective bargaining agreement shall be for the duration of its term.

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[12] *International Paperworkers Union v. Misco, Inc.*, 484 U.S. 29, 38 (1989).

The difference between labor and commercial arbitration should in principle lead to a more generous standard of review in labor arbitration cases. A commercial arbitration award, if set aside, simply changes the result in that particular litigation. A judicial revocation of a labor award changes the rule governing the continuing relationship of the parties. Thus in this case the decision below does more than reinstate Sheila Dixon's discharge. It declares that for the term of this agreement any employee who lies is subject to discharge. It also establishes a much broader proposition: that the contractual requirement for just cause does not apply if any employee commits any of the offenses which the agreement lists as not requiring warning or other progressive discipline, no matter what the circumstances. The decision of the arbitrator, whom the parties have chosen to determine what the applicable rule under this agreement shall be, has been supplanted by a decision of a court.

We believe that it is imperative that this court eliminate the disparity between the rules applicable to the enforcement of labor and commercial awards. We urge the Court to grant certiorari and in its decision make it clear that there is a unitary rule of decision applicable to both. The same standard applied by the courts in reviewing commercial arbitration decisions under the Federal Arbitration Act should be applied in the review of labor arbitration awards under Section 301. Specifically, a claim that an arbitrator's decision is contrary to the plain meaning of the agreement should be rejected unless it is shown, as it must be shown in the review of commercial arbitration awards, that the arbitrator consciously determined not to accept the language of the agreement as binding upon him.[13]

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[13] We do not urge, be it noted, that the same standard must be applied where an arbitrator is construing or applying public law providing protection for employees pursuant to *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). On that issue see

III. THE "EMERGING TREND" IDENTIFIED BY THE FIFTH CIRCUIT UNDERMINES THE NATIONAL LABOR POLICY.

It should not be assumed that it is only employers who seek to upset labor arbitration awards. True, in earlier days it was unheard of for a union unhappy with the result of an arbitration decision to seek to vacate it. But the invitation to seek review which the plain meaning rule offers has now been accepted by unions as well as employers.[14]

It could accurately be said in 1973 that "there has not been . . . a single instance in which a basic steel or major automobile manufacturing company, or the union representing its employees, has sought judicial decision as to the arbitrability of a grievance or review of an award."[15] That is no longer true. *Bethlehem Steel Corp. v. Steelworkers,* 138 LRRM 2091 (D. Md. 1991); *United Steelworkers v. Allegheny Ludlum Corp.,* 133 LRRM 2903 (W.D. Pa. 1990). (The statement seems to remain true in automobile manufacturing. In that industry, unlike steel, the no strike provisions have exceptions and, as the daily newspapers testify, strikes are common).

What is true in the steel industry is true generally. The problem presented by the growing willingness to seek review of arbitration decisions is not only that individual awards will be set aside. Except in recent years in the Fifth Circuit a majority of contested awards are in fact

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Cole v. Burns International Services, 105 F.3d 1465, 1486 (D.C. Cir. 1997).

[14] See, e.g., *General Drivers Local 89 v. Payton's, Inc.,* 137 L.R.R.M. 2829 (W.D. Ky. 1959) *revd.* 927 F.2d 604 (6th Cir. 1991); *Oil, Chemical & Atomic Workers v. Amoco Oil Co.,* 811 F. Supp. 260 (S.D. Texas 1993) *revd.* 12 F.3d 208 (5th Cir. 1993); *United Steelworkers v. The Timken Co.,* 717 F.2d 1008 (6th Cir. 1983).

[15] Feller, *A General Theory of The Collective Bargaining Agreement,* 61 Cal. L. Rev. 663, 772 (1973).

confirmed. The problem is that the increase in litigation undermines the Federal labor policy that disputes as to the meaning of a collective bargaining agreement should be resolved by arbitration rather than industrial strife. If arbitration becomes only a way station on the road to judicial interpretation of collective bargaining agreements that policy will essentially be frustrated. The right to strike will become the terminal point in the grievance procedure, as in *Grove v. Ring Screw Works*, 498 U.S. 168 (1990).

That we are well on the way to that destination can be demonstrated. It is impossible to prove with precision that the proportion of arbitration decisions being attacked in court is increasing. But we as practitioners recognize it to be true. And there are two published studies which taken together make it clear that this is the trend. The first study [16] shows, on the one hand, that the total number of labor arbitration awards is decreasing, largely as a function of the decline in unionization. There are no statistics as to the total number of labor arbitration awards but the number of awards issued by arbitrators appointed though the Federal Mediation and Conciliation Service and the American Arbitration Association serve as a reliable proxy. They show that there has been a decline in the number of arbitration awards of 32.5% from the late 1970s to 1990 and that the number has remained relatively constant since then.[17]

While the number of awards was declining, the second study [18] shows that, on the other hand, the number of cases in which there was judicial review has been increas-

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[16] Nolan and Abrams, *Trends in Private Sector Grievance Arbitration*, in Labor Arbitration Under Fire (Stern and Nijita, eds. 1997).

[17] *Id.* at 49.

[18] LeRoy and Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78 (1991).

ing. In the 22 year period from 1960 (the date of *Enterprise Wheel and Car*) through 1981 there were 187 such cases in all of the circuits, for an average of 8.5 per year. But in the later ten year period from 1982 through 1991 there were more than 240 cases, for an average of more than 24 per year.[19] The same phenomenon appears in the number of reported district court decisions, an increase from an average of 24 per year in the 1960-1981 period to 50 per year in the 1982-1991 period. Equally significant, the percentage of cases in which a contested award was enforced in the courts of appeal dropped from 74.9% in the 1960-1981 period to 67% in the 1982-1991 period.

There has been no published study comparing the decisions of the Fifth Circuit alone in these two periods. We have, however, examined all of the relevant decisions of the Fifth Circuit in the ten year period from June, 1987 to date. What we found is that in the Fifth Circuit alone there have been 18 opinions involving the enforcement of arbitration awards and that in only 7, or less than 40%, was the award enforced.

Something should be done to arrest this trend if the Federal labor policy to substitute arbitration for industrial strife as a method of resolving disputes during the term of a collective bargaining agreement is not to be undermined. It is understandable that courts, accustomed as they are to being the final arbiter as to the meaning of contracts, should fail to recognize that in this area they must suppress their natural inclination to correct what they believe has been wrongly decided. And so it may be necessary every ten years or so to remind the courts that in this area that is not their function.

Oral argument is not necessary. A *per curiam* opinion echoing in substance *Misco* and the statement of the Seventh Circuit in *Hill v. Norfolk and Westerns Ry. Co., supra,* will suffice. But something, we submit, must be

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[19] *Id.* at 102. The number is more than 240 since the study includes for 1991 only cases involving public policy challenges.

done to preserve the system that has served management, labor and the nation so well.

CONCLUSION

For the reasons set forth, certiorari should be granted, the decision of the Fifth Circuit should be reversed and the judgement of the District Court reinstated.

Respectfully submitted,

DAVID E. FELLER *
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720-7200
(510) 642-0629

GEORGE NICOLAU
Immediate Past President
125 East 10th Street
New York, NY 10003-7504
Attorneys for the National Academy of Arbitrators

*Counsel of Record